

Message Text

CONFIDENTIAL

PAGE 01 SANTIA 03847 251423Z
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C O N F I D E N T I A L SANTIAGO 3847

E. O. 11652: GDS
TAGS: SHUM, CI
SUBJECT: THE CHILEAN AMNESTY AND THE DISAPPEARED PROBLEM

REF: SANTIAGO 3861

1. THERE ARE REPORTS THAT SOME CIRCUITS OF THE CIVILIAN COURT OF APPEALS HAVE CLOSED LONGSTANDING INVESTIGATIONS INTO SUSPICIOUS DISAPPEARANCES BECAUSE OF THE APRIL 18 AMNESTY. SHOULD THESE DECISIONS STAND (WE UNDERSTAND THAT VARIOUS APPEALS WILL BE TRIED) THE CIVILIAN COURTS WOULD HAVE SIDESTEPPED RESPONSIBILITY FOR CLARIFYING THE DISAPPEARANCE OF AT LEAST SIX HUNDRED CHILEANS.

2. BY WAY OF BACKGROUND, OVER THE YEARS RELATIVES OF PEOPLE PRESUMED TO HAVE BEEN ABDUCTED BY SECURITY SERVICES HAVE FILED HABEAS CORPUS PETITIONS IN CIVIL COURTS. NORMALLY, AFTER A PERFUNCTORY SERIES OF INQUIRIES THE COURTS MADE A PRELIMINARY FINDING BUT LEFT THE CASE PENDING. THE COURT WOULD THEN PROCEED TO FOLLOW-UP ON FURTHER INFORMATION DEVELOPED BY THE NEXT-OF-KIN. IN A FEW PARTICULARLY EGREGIOUS CASES, WHEN GOC COMPLICITY WAS VIRTUALLY ESTABLISHED, SPECIAL INVESTIGATING JUDGES WERE DESIGNATED. THEY TOO RAN INTO AN OFFICIAL STONEWALL AND LEFT THEIR FINDINGS TENTATIVE.

3. THE HABEAS CORPUS REQUESTS NORMALLY ASSERT THAT THE MISSING
CONFIDENTIAL

CONFIDENTIAL

PAGE 02 SANTIA 03847 251423Z

PERSON WAS ABDUCTED BY THE SECURITY SERVICES. THE GOVERNMENT'S APRIL 18 AMNESTY WAS INTENTIONALLY APPLIED TO SUCH CRIMES AS KIDNAPPING, HOMICIDE, ILLEGAL SEARCH AND DETENTION AND MISTREATMENT OF PERSONS (TORTURE). ACCORDING TO SOME JURISTS (BUT NOT ALL-SEE PARA 6) THE JURIDICAL EFFECT OF AN AMNESTY IS TO LEGALLY ERASE THE FACT OF THE CRIME RATHER THAN TO PARDON A PERSON SHOWN TO BE RESPONSIBLE FOR THE WRONG-DOING. ACCORDINGLY, SOME APPEALS

COURT JUSTICES REPORTEDLY HAVE AGREED AMONG THEMSELVES THAT THE AMNESTY APPLIES TO CASES BROUGHT BY THE RELATIVES OF THE DISAPPEARED.
IN SOME INSTANCES THEY HAVE RULED THAT THE CASES SHOULD BE PERMANENTLY CLOSED.

4. HUMAN RIGHTS LAWYERS, PARTICULARLY THOSE ASSOCIATED WITH THE VICARIATE OF SOLIDARITY, HOPE TO APPEAL THE CASES RELYING LARGELY ON THE ARGUMENTS THAT KIDNAPPING IS A CONTINUING CRIME. WHICH IS TO SAY THAT WHEN THE VICTIM DID NOT APPEAR AFTER MARCH 11, 1978, (THE END OF THE PERIOD OF AMNESTY) IT COULD BE PRESUMED THAT THE KIDNAPPING CONTINUED AND THAT THE COURTS SHOULD CONTINUE TO INVESTIGATE.

5. ANOTHER APPROACH, TYPIFIED BY DOCUMENTS PRODUCED BY THE RELATIVES OF THE MISSING AND A DECLARATION BY THE CATHOLIC VICARS OF SANTIAGO, CONCENTRATES ON THE DISTINCTION BETWEEN PUNISHING THOSE INVOLVED IN THE DISAPPEARANCES (WHO MAY OR MAY NOT BE AMNESTIED) AND CLARIFYING THE CURRENT STATUS OF THE MISSING. THEY RELY HEAVILY ON THE GOC'S MANY PLEDGES TO PRODUCE A CREDITABLE EXPLANATION OR CLARIFICATION.

6. JURISTS ARE NOT OF ONE MIND ON THE SUBJECT. A LAWYER WHO WORKS CLOSELY WITH THE USG ON ANOTHER MATTER FINDS THE ARGUMENT THAT KIDNAPPING IS A CONTINUING CRIME PLAUSIBLE. THE PRESIDING JUDGE OF THE MILITARY APPEALS COURT, CIVILIAN JOSE CANOVAS. BLURRED
CONFIDENTIAL

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PAGE 03 SANTIA 03847 251423Z

A DISTINCTION BETWEEN AMNESTY AND PARDON IN A MAY 14 INTERVIEW IN "EL MERCUIRO". CANOVAS, ARGUES THAT AMNESTY CANNOT BE APPLIED UNTIL THE NATURE OF THE CRIME HAS BEEN ASCERTAINED, AND THE PERPETRATOR IDENTIFIED. MOREOVER, SINCE THE AMNESTY DOES NOT COVER ALL CRIMES, THE INVESTIGATION MUST BE PURSUED UNTIL IT IS DETERMINED THAT THE CRIME FALLS WITHIN ITS PURVIEW. ON THE OTHER HAND COURT PRESIDENT EYZAGUIRRE TOLD THE AMBASSADOR THAT WHATEVER HAPPENED TO THE DISAPPEARED OCCURRED DURING THE AMNESTY PERIOD. THUS THE COURTS HAVE NO AUTHORITY TO PURSUE THEIR INQUIRIES.

7. COMMENT: THE FATE OF THE DISAPPEARED CONTINUES TO PRESENT LEGAL, MORAL AND POLITICAL PROBLEMS. THE COURTS HAVE NEVER BEEN ENTHUSIASTIC ABOUT INVOLVING THEMSELVES IN SITUATIONS MAKING THEM LOOK PARTICULARLY POWERLESS. INVESTIGATIONS INTO DISAPPEARANCES CERTAINLY GAVE THAT IMPRESSION. NONETHELESS, THE EXISTENCE OF PENDING COURT CASES KEPT PRESSURE ON THE GOC TO CUT BACK ON SUCH EXCESSES AND IT GAVE THE NEXT-OF-KIN HOPES THAT SOMEDAY A JUDICIAL REMEDY MIGHT EMERGE.

8. THE ESSENCE OF HABEAS CORPUS IS TO REQUIRE A GOVERNMENT TO ACCOUNT TO A COURT FOR WHAT IT HAS DONE TO A PERSON. WHETHER OR NOT A CRIME OCCURRED WOULD SEEM TO BE A SEPARATE ISSUE. AS IS

CLEAR FROM THE FOREGOING, HOWEVER, CHILEAN JURISTS ARE NOT UNANIMOUS AS TO THE MEANING OF AN AMNESTY AS REGARDS SUCH CASES. SHOULD THE RELATIVES LOSE THEIR APPEALS IN THE COURTS, THEY WILL HAVE LOST AN IMPORTANT PRESSURE POINT ON THE GOC.

9. WHILE THIS MAY SATISFY SOME GOC OFFICIALS IT IS A CAUSE OF CONCERN TO OTHERS. THE AMBASSADOR HAS RAISED THIS SITUATION WITH FOREIGN MINISTER CUBILLOS ON TWO RECENT OCCASIONS EXPRESSING CONCERN THAT THE PROBLEM OF THE MISSING RELATIVES CANNOT BE SIMPLY SWEEPED AWAY. CUBILLOS SUGGESTED, WITH HOW MUCH REFLECTION WE CANNOT BE SURE, THAT IF THE COURTS CLOSE THE CASES NOW PENDING BEFORE THEM, THEN THE EXECUTIVE BRANCH SHOULD SET UP A SPECIAL OFFICE TO PURSUE THE INVESTIGATIONS.

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PAGE 04 SANTIA 03847 251423Z

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